Supreme Court, U.S.
FILED

No. 041137 FEB 22 2005

OFFICE OF THE CLERK

In The

Supreme Court of the United States

NEW YORK CITY TRANSIT AUTHORITY,

Cross-Petitioner,

v.

JESSICA RODRIGUEZ-FREYTAS,

Cross-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

RICHARD SCHOOLMAN
Counsel of Record for Cross-Petitioner
Office of Martin B. Schnabel,
General Counsel
NEW YORK CITY TRANSIT AUTHORITY
130 Livingston Street
Brooklyn, NY 11201
Tel. [718] 694-4667

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

When a court of appeals determines that a plaintiff settled her civil action under circumstances that did not make her a "prevailing party" eligible for attorney's fees under this Court's decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), and thus vacates a district court's award of attorney's fees to the plaintiff, may the court of appeals nevertheless, "[i]n the interests of fairness, and pursuant to 28 US.C. § 2106," remand the case to the district court so that the plaintiff may elect to "cancel the settlement agreement" and proceed toward trial on the reasoning that, because the settlement was negotiated at a time shortly before *Buckhannon* was issued, it had been "reasonable for [plaintiff] to believe that she was entitled to an award of attorney's fees"?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
BASIS FOR JURISDICTION	2
THE STATUTE INVOLVED IN THE CASE	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE CROSS-PETITION FOR A WRIT OF CERTIORARI	8
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

Ackermann v. United States, 340 U.S. 193 (1950) 7, 10, 11, 12

Barr v. Mateo, 355 U.S. 171 (1957) 7, 12

Bennett v. United States Lines, Inc., 64 F.3d 62 (2d Cir. 1995) 8

Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598 (2001) ..... *passim*

Coltec Industries, Inc. v. Hobgood, 280 F.3d 262 (3d Cir.), *cert. denied*, 537 U.S. 947 (2002) 11

Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993) 7, 8, 9

James B. Beam Distilling Co. v. Georgia, 502 U.S. 529 (1991) 9

Schwartz v. United States, 976 F.2d 213 (4th Cir. 1992) 11

Toms v. Taft, 338 F.3d 519 (6th Cir. 2003) 9

CONSTITUTIONAL PROVISION

U.S. Const. Art. III, § 2 12

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2106 ..... 2, 7, 9, 10, 11

42 U.S.C. § 1983 3

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1988 4

42 U.S.C. § 2000e 3, 4

Fed. R. Civ. P. 41(a)(1)(ii) 3

Fed. R. Civ. P. 60(b) 7, 9, 11

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

The New York City Transit Authority (hereinafter, the "Transit Authority") respectfully prays, if the Court issues a writ of certiorari to review portions of the summary order, judgment, and decree of the United States Court of Appeals for the Second Circuit issued on April 27, 2004, as prayed for by Jessica Rodriguez-Freytes[1] in her petition for a writ of certiorari (docketed as No. 04-973), that this Court's writ also include review of another portion of that summary order, judgment, and decree, *i.e.*, the portion by which the Court of Appeals, "[i]n the interests of fairness, and pursuant to 28 U.S.C. § 2106," granted Ms. Rodriguez-Freytes the unilateral opportunity to cancel the settlement agreement by which she had stipulated to the dismissal of this case.

OPINIONS BELOW

The summary order, judgment, and decree (hereinafter referred to as the "summary order") of the United States Court of Appeals for the Second Circuit is *inaccurately* reproduced both in Appendix A (at App. 1-5) of Ms. Rodriguez-Freytes's petition for a writ of certiorari and at 95 Fed.Appx. 392 (2d Cir. 2004). That summary order, as actually sent to the parties by the Clerk of the Court of Appeals, is accurately reproduced in this cross-petition's Appendix (at A. 1-5). The decision of the District Court for the Eastern District of New York is unreported and is

[1] Ms. Rodriguez-Freytes's name is sometimes misspelled in the Court of Appeals' summary order as "Rodriguez-Freytas."

reproduced in Appendix B of Ms. Rodriguez-Freytes's petition for a writ of certiorari.[1]

BASIS FOR JURISDICTION

The summary order of the United States Court of Appeals for the Second Circuit in this case was issued and filed on April 27, 2004. A timely motion for rehearing was filed by the Transit Authority on May 10, 2004. The Second Circuit denied the motion for rehearing on October 18, 2004. Ms. Rodriguez-Freytes timely submitted a petition for a writ of certiorari on January 18, 2005, which writ was docketed in this Court on January 24, 2005. This conditional cross-petition is being timely submitted by the Transit Authority within 30 days of the docketing of Ms. Rodriguez-Freytes's initial petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

THE STATUTE INVOLVED IN THE CASE

The question presented for review by this cross-petition involves the proper application of 28 U.S.C. § 2106, which reads as follows:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

This case was commenced in August 1999 by a Transit Authority employee, Jessica Rodriguez-Freytes. Suing under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and under 42 U.S.C. § 1983, plaintiff asserted that the Transit Authority had discriminated against her because she was pregnant. In her complaint, she asked for compensatory damages of $1,000,000, as well as injunctive and declaratory relief. After some discovery had been had, the parties' attorneys, in January and February 2001, agreed to settle the case. (The settlement was facilitated by the assigned magistrate judge (Hon. Joan M. Azrack, M.J.), who had no decretal power in the case but had some familiarity with it, having supervised discovery.) By that settlement, plaintiff agreed to stipulate to the dismissal of her action with prejudice, and the Transit Authority agreed to pay her a lump sum of $41,518.60; there was no declaratory or injunctive relief provided by the settlement. (Whether plaintiff was entitled to any attorney's fees was a matter that the parties agreed to let the district court (in the person of the assigned judge, Hon. John Gleeson, J.) decide.)

The stipulation called for by the parties' settlement agreement, by which the action was dismissed with prejudice, was signed by the attorneys for both sides, and then filed with the Clerk of the district court by February 15, 2001. (Pursuant to a local custom, that stipulation was "so ordered" by Judge Gleeson (on February 16, 2001), but it had become effective earlier, upon being filed, under Fed. R. Civ. P. 41(a)(1)(ii).) Some eight weeks later the Transit Authority sent Ms. Rodriguez-Freytes a check for the agreed upon amount. The actual terms of the settlement agreement were never incorporated in any consent

decree, were never incorporated into any order of dismissal signed by a district court judge, and were never incorporated in any other order that gave the district court continuing jurisdiction to enforce the terms of the settlement agreement (*e.g.*, the obligation of the Transit Authority to pay Ms. Rodriguez-Freytes over $41,000).

Simultaneous with the filing of the stipulation of dismissal in February 2001, plaintiff's attorney applied to the district court for an award of attorney's fees under 42 U.S.C. § 2000e-5(k) and 42 U.S.C. § 1988 on the theory that plaintiff, by virtue of the settlement agreement, was a "prevailing party" as thus presumptively entitled to an award of such attorney's fees. That motion was referred by Judge Gleeson to Magistrate Judge Azrack for a report and recommendation. Shortly thereafter (on May 29, 2001), this Court issued its opinion in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001); the Transit Authority promptly brought *Buckhannon* to the district court's attention and argued that, under *Buckhannon*, because this action had been settled without a court-ordered consent decree (and without any judgment on the merits), plaintiff could not be considered a "prevailing party."

In her subsequent report, Magistrate Judge Azrack recommended that *Buckhannon* be deemed inapposite and that Ms. Rodriguez-Freytes be deemed the "prevailing party" (and went on to recommend about $15,000 as reasonable attorney's fees for plaintiff, less than half the amount that plaintiff's counsel had applied for). The Transit Authority objected to so much of the magistrate judge's report as had recommended that *Buckhannon* be deemed inapposite and that plaintiff be deemed the

"prevailing party." By an order dated October 15, 2001, however, Judge Gleeson upheld the report, determining that *Buckhannon* was inapposite as this action was one "for money damages under Title VII and [42 U.S.C.] § 1983 and thus this case falls outside *Buckhannon*'s holding." Petitioner's Appendix at App. 7. Judge Gleeson continued by concluding that, even if *Buckhannon* applied, the involvement of the magistrate judge in the parties' "settlement negotiations" (which included the magistrate judge's recommendation – a certainly reasonable one but one that was not binding on the Transit Authority – that plaintiff's attorney keep to the formula that that attorney had initially agreed to for the calculation of the settlement's total payment amount) provided "judicial imprimatur" on the terms of the settlement agreement sufficient to meet the standards of *Buckhannon* for a "prevailing party." *Id.* Judge Gleeson thus granted plaintiff's motion for an award of attorney's fees in the amount recommended by the magistrate judge. The Transit Authority timely appealed to the Court of Appeals for the Second Circuit from this fee-awarding order, and raised solely the question of whether, in light of *Buckhannon*, Ms. Rodriguez-Freytes was a "prevailing party" and thus entitled to any attorney's fees.

In a summary order issued April 27, 2004, the Second Circuit (correctly in the Transit Authority's view) vacated the order appealed from that had awarded Ms. Rodriguez-Freytes attorney's fees as the "prevailing party." The Second Circuit concluded that the case had been settled by a voluntary "agreement negotiated by the parties." Transit Authority Appendix at A. 4. The Second Circuit went on: "Although Ms. Rodriguez-Freyt[e]s received a monetary award pursuant to that settlement, it is uncontested that

. . . the district court never granted her any relief on the merits, nor did the district court order a consent decree or endorse, or retain jurisdiction over, the settlement agreement . . . ." *Id.* (internal quotation marks, brackets, and citation omitted). The Second Circuit accordingly concluded that, as a matter of law (*i.e.*, "according to *Buckhannon*"), Ms. Rodriguez-Freytes "cannot be considered a prevailing party, and is therefore not entitled to attorney's fees." *Id.*

The Second Circuit, however, remanded the case to the district court "[i]n the interests of fairness, and pursuant to 28 U.S.C. § 2106." Transit Authority Appendix at A. 5. It reasoned that "the settlement agreement in this case was negotiated [in January-February 2001] pre-*Buckhannon*, when it would have been reasonable for Ms. Rodriguez-Freyt[e]s to believe that she was entitled to an award of attorney's fees." *Id.* at 4-5. Back in the district court, the summary order specifies, Ms. Rodriguez-Freytes is to be given the opportunity to "re-negotiate the settlement agreement" in a form (a consent decree) that would entitle the plaintiff to attorney's fees; and if such re-negotiation fails, 'Ms. Rodriguez-Freyt[e]s should be given the option to either: (1) cancel the settlement agreement and proceed toward an adjudication on the merits or (2) confirm the settlement agreement and forgo the attorney's fees awarded to her by the October 15th Order [*i.e.*, the order of the district court that had awarded attorney's fees to the plaintiff]." *Id.* at 5.

In so remanding, the summary order conflicts generally with decisions of this Court in several important respects, and creates a conflict between courts of appeals as to the effect of *Buckhannon*. The summary order conflicts with decisions of this Court that would require

complete retroactive application of *Buckhannon* to all cases pending or being reviewed when *Buckhannon* was decided. (*See, e.g., Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993), discussed *infra*.) It also creates a specific conflict with another court of appeals as to whether a party who settled a case pre-*Buckhannan* should be treated as if that party were a "prevailing party" because, at the time of that settlement, the law in the settling party's circuit would have made the party a "prevailing party." And the summary order also involves a question of exceptional importance for the administration of the courts, that is, whether 28 U.S.C. § 2106 and "interests of fairness" allow a court – without reference to Rule 60(b) of the Federal Rules of Civil Procedure – to let a represented party who settles a civil case to cancel the settlement (after dismissal of the case with prejudice pursuant to the terms of the settlement), if that party had "reasonabl[y]" relied on a "belie[f]" about a legal principle when settling and that belief later turns out, via a controlling decision of a higher court (here, of this Court), to be mistaken. In this respect, the summary order conflicts with principles concerning the finality of freely chosen decisions in civil litigation, including decisions to stop litigating (as discussed, for instance, in *Ackermann v. United States*, 340 U.S. 193, 198 (1950), discussed *infra*), and allows the appellate process to result in the issuance of what is effectively an advisory opinion, a result apparently contrary to the law interpreting the Constitution's "case" or "controversy" requirement as enunciated by this Court (in, for instance, *Barr v. Mateo*, 355 U.S. 171, 172 (1957)).

The Transit Authority thinks that these aspects of the remand portion of the Court of Appeals' summary order

merit this Court's review (if the petition for a writ of certiorari submitted by Ms. Rodriguez-Freytes is granted).

REASONS FOR GRANTING THE CROSS-PETITION FOR A WRIT OF CERTIORARI

The Second Circuit's summary order in this case correctly determined that plaintiff's settlement agreement with the defendant Transit Authority did not make her, under *Buckhannon*, a "prevailing party" and thus she was not entitled to attorney's fees. But the Second Circuit, in remanding the case to give the plaintiff a chance to cancel the settlement because, when she (through counsel) had been negotiating it, she had a "reasonable . . . belie[f]" that she would be entitled to attorney's fees, essentially rejected giving full retroactive effect to *Buckhannon*. In so doing, the remand portion of the summary order in this case conflicts directly with principles established by this Court: that a clarification of federal law by this Court in a civil case is both "controlling" and "must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule," *Harper v. Virginia Department of Taxation*, 509 U.S. at 97. And, as the Second Circuit itself had recognized (in an earlier decision), under those principles, notwithstanding a potentially "harsh result," a lower court "may not refuse to apply the rule [announced by a higher court in one case] to [a plaintiff in a subsequent case] on the basis that that rule was announced while resolution of [the subsequent plaintiff's] case was still pending," *Bennett v. United States Lines, Inc.*, 64 F.3d 62, 67 (2d Cir. 1995), *citing*

James B. Beam Distilling Co. v. Georgia, 502 U.S. 529, 540 (1991), and *Harper*, 509 U.S. at 97.

The Second Circuit's remand in this case, moreover, has created a conflict between courts of appeals. In *Toms v. Taft*, 338 F.3d 519, 529-30 (6th Cir. 2003), a settling plaintiff argued expressly for an exemption from full retroactive effect for *Buckhannon* because the settlement had been reached before *Buckhannon* was issued; that argument was rejected by the Sixth Circuit.

The remand portion of the Second Circuit's summary order also involves a question of exceptional importance for the administration of federal civil litigation generally. That question is whether a plaintiff who voluntarily settles a case may obtain from an appellate court, under 28 U.S.C. § 2106 and "[i]n the interests of fairness" (without even purporting to meet any of the standards of Fed. R. Civ. P. Rule 60(b)), the opportunity to cancel the settlement agreement unilaterally because, *after* the settlement was reached and (as part of the settlement) the case dismissed with prejudice, a principle of law that the plaintiff "reasonabl[y] . . . believed" that she could rely on in negotiating the settlement's terms (although that principle was *not* then found in any holding of this Court, and the courts of appeals were *not* unanimous),[2] was thereafter rejected by the Supreme Court (or some

[2] In *Buckhannon*, *certiorari* had been granted on September 26, 2000 (530 U.S. 1304), *i.e.*, several months before the settlement agreement in this case was negotiated in January-February 2001. This Court in *Buckhannon* also noted both that it had granted *certiorari* in order to resolve a split of authority among the circuits that was at least six years old (532 U.S. at 602) and that the way it was resolving that split was consistent with its prior "*holdings*" if not necessarily prior dicta (532 U.S. at 605-06) (emphasis in original).

relevant lower court, for that matter). As far as we know, neither 28 U.S.C. § 2106 nor "interests of fairness" unmoored to any statute have *ever* been relied on to support the "do-over" option that the summary order grants to the plaintiff here. Since "reasonable" expectations or "belief[s]" going to the law concerning the substantive merits of a claim, or its procedural soundness, or its possible remedies, often turn out to be mistaken, to allow a settling plaintiff (or a settling defendant) the chance to cancel a settlement agreement after a case has been dismissed based on that settlement when such a party's belief about the law, although "reasonable" when the settlement had been made (at least in the particular circuit in which the party's case was then pending) turns out to be mistaken would seriously undermine the finality of negotiated settlements and make settlements much harder to negotiate, and thus destabilize the workings of civil litigation in the federal courts.

As this Court has observed generally, where a civil litigant made a "considered choice" in the litigation, that

> choice was a risk, but calculated and deliberate and such as follows a free choice. [That litigant] cannot be relieved of such a choice because hindsight seems to indicate to [that litigant] that [that] decision . . . was probably wrong, considering the outcome of [another] . . . case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.

Ackermann v. United States, 340 U.S. at 198 (plaintiff not relieved of his choice not to appeal). And in light of *Ackermann*, the courts of appeals regularly reject arguments

by plaintiffs that they should be relieved of settlement agreements under which they have dismissed their claims because, after the settlement agreements were effected, relevant decisional law changes. *See, e.g., Coltec Industries, Inc. v. Hobgood*, 280 F.3d 262, 275 (3d Cir.) ("even if Coltec's decision to settle was improvident in hindsight [because of a subsequent Supreme Court decision], the decision [to settle by dismissing a claim] has been made and cannot be revisited"), *cert. denied*, 537 U.S. 947 (2002); *Schwartz v. United States*, 976 F.2d 213, 218 (4th Cir. 1992) ("A litigant [settling a case] weighs the chance of success through further litigation, all based on whatever limited information is available at that time. [Plaintiff] necessarily undertook such a cost-benefit weighing when he decided to settle . . . His was . . . [a] calculated, free and deliberate . . . choice . . . and . . . he should not be relieved from it.") Moreover, *Ackermann, Coltec Industries, Schwartz*, and similar cases all seem to involve parties seeking relief from litigation decisions (including stipulations withdrawing claims or other settlements) under Fed. R. Civ. P. 60(b). In *this* case, Rule 60(b) has not even been mentioned in the Second Circuit's order, only "interests of fairness" and 28 U.S.C. § 2106, which section, so far as we are aware, has *never* been used to support the kind of "do-over" remand that was directed by the summary order in this case.

The kind of remand directed by the Second Circuit's order would also convert that order and comparable ones into after-the-fact advisory opinions, ones in which a court tells parties that one side's (lawyer's) "belie[f]" about a legal principle that that side had relied on in the course of negotiating a settlement was mistaken but, because that

belief had been "reasonable," the case may proceed as if the settlement had never happened. That result is contrary to the limitations in Article III, § 2 of the Constitution that federal courts address themselves only to actual and real "cases" or "controversies." In *Barr v. Mateo*, 355 U.S. at 172, the Court observed that "an advisory opinion cannot be extracted from a federal court by agreement of the parties." Advisory opinions should especially not be issued in an area so central to the functioning of the legal system, *i.e.*, the finality of settlement agreements and the continuing validity of the concept that "[t]here must be an end to litigation someday, and free, calculated, deliberate choices [to end litigation] are not to be relieved from," *Ackermann*, 340 U.S. at 198.

CONCLUSION

The Court of Appeals correctly held that the parties' settlement agreement did not make the plaintiff a "prevailing party" and thus she was not entitled to attorney's fees; that decision correctly vacated the district court's order that had awarded the plaintiff attorney's fees. For the reasons outlined above, however, this Court, if it grants plaintiff's petition for a writ of certiorari on the correctness of that interpretation or application of *Buckhannon*, should also grant the defendant Transit Authority's conditional cross-petition to permit review of so much of the summary order as remanded this case to the district

court to give the plaintiff the opportunity to cancel the settlement agreement and proceed towards trial.

Dated: Brooklyn, New York
February 17, 2005

Respectfully submitted,

RICHARD SCHOOLMAN
Counsel of Record for Cross-Petitioner
Office of Martin B. Schnabel,
General Counsel
NEW YORK CITY TRANSIT AUTHORITY
130 Livingston Street
Brooklyn, NY 11201
Tel. [718] 694-4667

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United Stated Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the day of two thousand and four.

Present: THOMAS J. MESKILL,
JON O. NEWMAN,
ROSEMARY S. POOLER,

Circuit Judges.

JESSICA RODRIGUEZ-FREYTAS,

Plaintiff-Appellee,

-v- (01-9443)

NEW YORK CITY TRANSIT AUTHORITY,

Defendant-Appellant.

(Filed Apr. 27, 2004)

Appearing for Appellee: Leon Friedman, New York, NY.

Appearing for Appellant: Richard Schoolman, New York, NY.

Appeal from the United States District Court for the Eastern District of New York (Gleeson, J.).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **VACATED AND REMANDED.**

We are asked on this appeal to review a judicial award of attorney's fees in the context of a civil rights action that was discontinued pursuant to a settlement agreement.

Plaintiff-appellant Jessica Rodriguez-Freytes commenced this action on August 18, 1999, by filing a complaint in the U.S. District Court for the Eastern District of New York. In her complaint, she alleged that the New York City Transit Authority ("NYCTA"), which employed her as a train operator, "ha[d] implemented a custom, policy and practice of removing pregnant train operators from active work shortly after learning that the individual is pregnant and despite the fact that the pregnant individual is not disabled, all of which is done because such train operators are pregnant. Similarly situated non-pregnant train operators are permitted to continue working." The complaint alleges that this amounts to discrimination in violation of the Fourteenth Amendment to the U.S. Constitution, 42 U.S.C. § 1983, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*

The parties eventually negotiated a settlement pursuant to which NYCTA would pay Ms. Rodriguez-Freytes back pay in the amount of $16,518.60, and damages for emotional distress in the amount of $25,000.00, for a total of $41,518.60. Judge Gleeson subsequently issued a "Settlement and Order of Dismissal," which acknowledged the settlement agreement and dismissed the action subject

to Ms. Rodriguez-Freytas's reservation of the right to apply for attorney's fees.

Ms. Rodriguez-Freytes subsequently moved for an award of attorney's fees pursuant to 42 U.S.C. § 1988 and 42 U.S.C. § 2000e-5(k). In a Report and Recommendation, dated September 14, 2001, Magistrate Judge Azrack found that an award in the amount of $14,712.50 was appropriate. This figure was approved by Judge Gleeson in an Order, dated October 15, 2001 ("the October 15th Order").

Numerous federal statutes, including § 1988 and § 2000e-5(k), allow courts to award attorney's fees and costs to the "prevailing party." In *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources,* 532 U.S. 598 (2001), which was decided shortly before the October 15th Order was issued, the Supreme Court considered whether what is commonly known as "the catalyst theory" may serve as a basis for attorney's fees pursuant to these statutes. The catalyst theory asserts that a plaintiff may be considered a prevailing party in a case in which the defendant's voluntary action moots the lawsuit by providing the relief sought by the plaintiff.

The Supreme Court held that the catalyst theory may not serve as a basis of an award of attorney's fees because the phrase "prevailing party" does not "authorize[] federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit," achieves a desired result "without obtaining any judicial relief." 532 U.S. at 606. Judicial relief is relief that amounts to a "judicially sanctioned change in the legal relationship of the parties." *Id.* at 605. Thus, "[a] defendant's voluntary change in conduct,

although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Id.*

In *Buckhannon,* the voluntary action which mooted the lawsuit was the defendant State's unilateral decision to repeal the regulations being challenged in the suit. *Buckhannon,* however, has been read by our Circuit to be applicable to situations in which a lawsuit is mooted by bilateral voluntary action, such as the conclusion of a settlement agreement among the parties which disposes of all issues raised by the suit. Thus, *Union of Needletrades, Industrial and Textile Employees v. INS,* 336 F.3d 200, 206 (2d Cir. 2003), involved a situation in which the parties "jointly reported [to the court] that they had 'settled all of the substantive issues in the case.'" We held that even though the plaintiff "may have accomplished the objective it sought to achieve by initiating" the lawsuit, "its failure to secure either a judgment on the merits or a court-ordered consent decree renders it ineligible for an award of attorney's fees under *Buckhannon.*" *Id.*

The instant case was also settled by an agreement negotiated by the parties. Although Ms. Rodriguez-Freytas received a monetary award pursuant to that settlement, it is uncontested that, as in *Needletrades,* "[t]he district court never granted [her] any relief on the merits," nor did "the district court order a consent decree or endorse, or retain jurisdiction over, [the] settlement agreement." 336 F.3d at 206. According to *Buckhannon,* she cannot be considered a prevailing party, and is therefore not entitled to attorney's fees.

We therefore vacate the October 15th Order. We are, however, sensitive to the fact that the settlement agreement

in this case was negotiated pre-*Buckhannon*, when it would have been reasonable for Ms. Rodriguez-Freytas to believe that she was entitled to an award of attorney's fees. In the interests of fairness, and pursuant to 28 U.S.C. § 2106, we therefore remand this action to the district court with instructions that it afford the parties an opportunity to re-negotiate the settlement agreement in the form of a consent decree over which the district court would retain jurisdiction for the purpose of enforcement. Should either of the parties decline this opportunity, Ms. Rodriguez-Freytas should be given the option to either: (1) cancel the settlement agreement and proceed toward an adjudication on the merits or (2) confirm the settlement agreement and forgo the attorney's fees awarded to her by the October 15th Order.

Accordingly, for the reasons set forth above, the judgment of the District Court is hereby **VACATED AND REMANDED.**

FOR THE COURT:

Roseann B. MacKechnie,
Clerk of Court

By:

/s/ Lucille Carr
Lucille Carr, Deputy Clerk

Supreme Court, U.S.
FILED
MAR 2 3 2005
OFFICE OF THE CLERK

No. 04-1137

In The

Supreme Court of the United States

NEW YORK CITY TRANSIT AUTHORITY,

Cross-Petitioner,

v.

JESSICA RODRIGUEZ-FREYTAS,

Cross-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

LEON FRIEDMAN
Counsel of Record
148 East 78th Street
New York, N.Y. 10021
(212) 737-0400

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

The New York City Transit Authority, the Cross-Petitioner here, has misread both the Second Circuit decision here and the law dealing with retroactive application of new decisions by this Court. For these reasons, the Conditional Cross-Petition must be denied.

As noted in the Cross-Petition, the Second Circuit held that the settlement in this case did not meet the requirements of *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001). The Court held that:

> The instant case was also settled by an agreement negotiated by the parties. Although Ms. Rodriguez-Freytas received a monetary award pursuant to that settlement, it is uncontested that, as held in [*Union of Needletrades, Industrial and Textile Employees v. INS,* 336 F.3d 200 (2d Cir. 2003)] "[t]he district court never granted [her] any relief on the merits," nor did "the district court order a consent decree or endorse, or retain jurisdiction over, [the] settlement agreement." 336 F.3d at 206. According to *Buckhannon,* she cannot be considered a prevailing party, and is therefore not entitled to attorney's fees. (A-4).

That aspect of the Court's decision is the subject of the Petition for Certiorari in Docket No. 04-973.

The Court noted that the settlement had been accomplished before this Court had decided *Buckhannon*. Thus "in the interest of fairness," the parties should have an opportunity to renegotiate the settlement.

> In the interests of fairness, we therefore remand this action to the district court with instructions that it afford the parties an opportunity to renegotiate the settlement agreement in the form of a consent decree over which the district court would retain jurisdiction for the purpose of enforcement. Should either of the parties decline this opportunity, Ms. Rodriguez-Freytas should be given the option to either: (1) cancel the settlement agreement and proceed toward an adjudication on the merits or (2) confirm the settlement agreement and forego the attorney's fees awarded to her by the October 15th Order. (A-5).

Cross-Petitioner seeks review of this aspect of the Second Circuit's decision.

Cross-Petitioner asserts that the opinion of the Second Circuit reported at 95 Fed. Appx. 392 (2d Cir. 2004) and contained in Petitioner's Appendix in Docket No. 04-973 is "inaccurate[]." It insists that the original decision sent to the parties by the court on April 27, 2004 was correct. (See Conditional Cross-Petition at 1). The only difference between the versions is that the first version contained an additional term: "In the interests of fairness *and pursuant to 21 U.S.C. § 2106*, we therefore remand this action. . . ." (A-5). The decision reported in the West Reporters does not contain the phrase: "*and pursuant to 21 U.S.C. § 2106.*" The Cross-Petitioner's claim is clearly wrong.

The idea that Westlaw would – out of the blue – simply omit one phrase from the court's decision is impossible to credit. It is clear that the Second Circuit must have deleted the phrase on its own sometime between the original decision and the publication in the West system. A

Court of Appeals often amends an original decision before it is officially published. The idea that this Court should review a decision of the Second Circuit in part because the published decision was "incorrect" is absurd.

With respect to the second basis for the Cross-Petition, there is no reason for the Court to review the Second Circuit decision. The Cross-Petitioner views the case as one if which the parties have settled a case, a judgment has been entered upon the settlement, and a court then opens up the settlement without meeting the requirements of Fed. R. Civ. Proc. 60(b).

But that is not what happened here. What the Court did was to acknowledge the unfairness of applying the *Buckhannon* rule to a party who relied upon the pre-*Buckhannon* law when she settled the case. The Court of Appeals explained:

> We are, however, sensitive to the fact that the settlement agreement in this case was negotiated pre-*Buckhannon,* when it would have been reasonable for Ms. Rodriguez-Freytas to believe that she was entitled to an award of attorney's fees. In the interests of fairness, we therefore remand this action to the district court with instructions that it afford the parties an opportunity to re-negotiate the settlement agreement in the form of a consent decree over which the district court would retain jurisdiction for the purpose of enforcement. (A-5).

Thus the correct legal issue is whether an appeal court may "in the interests of justice" refuse to apply a new decision retroactively to parties who relied upon the former legal rule. That issue is discussed in many cases.

Thus, in *Wedra v. LeFevre*, 988 F.2d 334, 342 (2d Cir. 1993), the Court explained:

> *Byrne* [*v. Buffalo Creek R.R. Co.*, 765 F.2d 364 (2d Cir. 1985)], stated that, although the general rule is that a court must apply the law in effect at the time it renders its decision, "in the interests of justice, courts may exclude certain cases from the retroactive application of a judicial decision." *Id.* at 366. The three factors we used in *Byrne* to determine whether to do this were: "(1) whether the judicial decision establishes a new principle of law; (2) whether retroactive operation would advance or inhibit the new ruling's effect; and (3) whether retroactive operation 'could produce substantial inequitable results.'"

Based on this rule, it is clear that the Second Circuit had the right not to give full effect to *Buckhannon* and to allow the parties to reevaluate the settlement they had arrived at in light of the new rule. There is no doubt *Buckhannon* established a new rule of law. Simply allowing the parties to reevaluate their situation in light of the new rule would not inhibit the new ruling's effect. And retroactive application of *Buckhannon* "could produce substantial inequitable results" as it did here. Thus, it was proper for the Second Circuit to allow the parties to return to their respective positions before the settlement was accomplished. There is no reason to challenge that decision here.

CONCLUSION

For the foregoing reasons, the Cross-Petition for a writ of certiorari should be denied.

Dated: New York, N.Y.
March 23, 2005

Respectfully submitted,

LEON FRIEDMAN
Counsel of Record
148 East 78th Street
New York, N.Y. 10021
(212) 737-0400
Attorney for Cross-Respondent
Jessica Rodriguez-Freytas